



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

January 10, 1974

The Honorable Clayton T. Garrison
Executive Director
Texas Parks & Wildlife Department
John H. Reagan Building
Austin, Texas 78701

Opinion No. H- 206

Re: Authority of the Parks and
Wildlife Commission to
prohibit seining in the Gulf
of Mexico more than one
mile from a pass

Dear Mr. Garrison:

You have advised us:

"Due to the recent flood conditions in the San Jacinto and Trinity River Basins, an unusually large amount of fresh water is entering the greater Galveston Bay complex. This has resulted in zero salinity in much of the Bay area. Many of the principal salt water game fish species are not able to adapt to this condition and have migrated into the Gulf through Bolivar Pass separating Bolivar Peninsula from Galveston Island. These fish tend to congregate in large numbers in a pocket eastward from the North Jetty. This permits an abnormal harvest of these fish through the use of seines and nets. By authority of Article 4045 Vernon's Civil Statutes and Article 941 Vernon's Penal Code, an area one mile either side of and extending into the Gulf of Mexico adjacent to and including Bolivar Pass has been closed to seines and nets except for minnow seines"

You then ask:

"Does the Parks and Wildlife Department have authority to close a portion of the Gulf of Mexico adjacent to Bolivar Pass in Galveston County to seines and nets in addition to that portion now closed by Departmental Order?"

Article 4045, Vernon's Texas Civil Statutes, provides in part:

"It shall be unlawful for any person at any time to place, to set or drag any seine or net, or to carry on, over or into the waters hereinafter referred to, or to have in his possession or to carry such seine or net by vehicle or in any other way to any point or place within one mile of such waters, or to use any other device or method for taking fish, other than the ordinary pole and line or cast-net or minnow-seine of not more than twenty feet in length for catching bait, within the waters described in Article 941 of the Penal Code. . . . The Commissioner, when he has reason to believe it is best for the protection and increase of fish life, or to prevent their destruction in the bays or parts thereof, or such tidal water, is hereby authorized to close such waters against fishing with any seine, net, spear, gig, light or other devices, except with a hook and line or cast-net or minnow-seine of not more than twenty feet in length. Before so closing any such waters, the Commissioner shall give notice of his intention to do so at least two weeks prior to such closing, giving the reason why action is deemed necessary, and which notice shall contain a designation of the area which it is proposed to close, a statement that after the date indicated in such notice it shall be unlawful to drag a seine or set a net or use a gig or spear and light in taking fish from such waters for the period which the Commissioner in said notice shall declare same to be closed. . . ." (emphasis added)

Article 941, Vernon's Penal Code - Auxiliary Laws (formerly Vernon's Texas Penal Code), provides in part:

"It shall be unlawful for any person to place, set, use or drag any seine, net or other device for catching fish and shrimp other than the ordinary pole and line, casting rod and reel, artificial bait, trot line, set line, or cast net

or minnow seine of not more than twenty feet in length for catching bait, or have in his possession any seine, net or trawl without a permit issued by the Game, Fish and Oyster Commissioners or by his authorized deputy in or on any of the waters of any of the bays, streams, bayous or canals of . . . Galveston Count[y], . . . or in or on the waters within one mile of the passes herein mentioned, connecting the bays and tidal waters of this State with the Gulf of Mexico or in or on or within a mile of any other such passes, or within the waters of any pass, stream or canal leading from one body of Texas bay or coastal waters into another body of such waters;" (emphasis added)

In the absence of conflicting federal legislation, it is within the police power of the State to promulgate regulations to protect its marine life resources within its territorial waters, Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), which in the case of Texas extend three marine leagues seaward, Submerged Lands Act, 43 U.S.C. §1301 et seq.; U.S. v. Louisiana, 363 U.S. 1 (1960); Employers Mutual Casualty Co. v. Samuels, 407 S.W. 2d 839 (Tex. Civ. App., San Antonio, writ ref'd. n.r.e.); Attorney General Opinion M-87 (1967). Nonetheless, the Parks and Wildlife Department possesses only such powers as are delegated to it expressly and impliedly by the Legislature. State v. Jackson, 376 S.W. 2d 341 (Tex. 1964).

The authority given the Commission to regulate seining and netting under Article 4045, V. T. C. S., is limited to those areas described in Article 941 of the Penal Code - Auxiliary Laws. Thus, Article 4045 confers no authority to regulate seining more than a mile seaward of a pass.

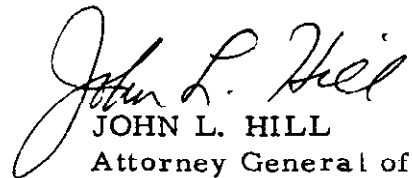
The Uniform Wildlife Regulatory Act, Article 978j-1, Vernon's Texas Penal Code - Auxiliary Laws, gives the Parks and Wildlife Commission broad regulatory powers; however, the Act does not apply to Galveston County. (Acts 1973, 63rd Leg., ch. 220, p. 515). As the boundary of Galveston County extends three marine leagues seaward, [Article 1592a, Vernon's Texas Civil Statutes; Attorney General Opinion M-87(1967)], the Uniform Wildlife Regulatory Act provides no authority to close an area more than one mile seaward of Bolivar Pass.

The Commission is given general jurisdiction over the marine life of the State by Article 4026, Vernon's Texas Civil Statutes, but that jurisdiction may be exercised only under the authority vested in the Commission by law. As we have found no statute permitting the prohibition of seining or netting in the Gulf of Mexico except within one mile of a pass, it is our opinion that the Commission may not close an area more than one mile gulfward of Bolivar Pass.

SUMMARY

The Parks and Wildlife Commission may prohibit the use of seines and nets in the Gulf of Mexico only in those areas which are within one mile of a pass connecting bays and tidal waters with the Gulf of Mexico.

Very truly yours,


JOHN L. HILL
Attorney General of Texas

APPROVED:


LARRY F. YORK, First Assistant


DAVID M. KENDALL, Chairman
Opinion Committee